

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PENSION PLAN FOR PENSION TRUST,
FUND FOR OPERATING ENGINEERS,
F.G. CROSTHWAITE and RUSSELL E.
BURNS, as Trustees,

Plaintiffs,

v.

DYNAMIC CONSULTANTS, INC.,
ANACON TESTING LABORATORIES,
INC., and DOES 1–20,

Defendants.

No. C 12-00487 WHA

**ORDER GRANTING IN
PART AND DENYING IN
PART PLAINTIFFS' MOTION
FOR DEFAULT JUDGMENT**

INTRODUCTION

In this ERISA action, plaintiffs move for default judgment against defendants. For the following reasons, the motion for default judgment is **GRANTED IN PART AND DENIED IN PART**.

STATEMENT

Plaintiffs seek default judgment against defendants. A prior order previously determined that the *Eitel* factors supported a finding of default judgment, but, deficiencies in the plaintiffs' complaint as to damages prevented final judgment (Dkt. No. 27). Plaintiffs have now submitted a new motion for default judgment.

The facts alleged in the plaintiff's complaint are as follows. Plaintiff Pension Trust Fund for Operating Engineers is an employee benefit plan as defined in the Employee Retirement

1 Income Security Act of 1974 (ERISA) (Compl. ¶ 5). Crosthwaite and Burns are trustees of the
2 plan (Compl. ¶ 6). Operating Engineers Local 3 is a labor organization as defined in the
3 National Labor Relations Act (Compl. ¶ 13). Defendant Dynamic Consultants, Inc. was a
4 participating employer in the plan pursuant to a collective bargaining agreement with
5 Operating Engineers Local 3. The collective bargaining agreement obligated Dynamic to make
6 contributions to the plan for the benefit of covered employees (Compl. ¶ 13). Plaintiffs allege
7 that defendant Anacon Testing Laboratories, Inc. is within the same control group as Dynamic,
8 and therefore the two entities are treated as a single employer pursuant to ERISA (Compl. ¶¶ 3,
9 18). In April 2009, Dynamic stopped contributing to the plan and made a complete withdrawal
10 under ERISA, subjecting Dynamic to withdrawal liability (Compl. ¶ 14). Plaintiffs allege that
11 defendants' assessed withdrawal liability pursuant to ERISA is \$1,094,355, plus accrued interest,
12 liquidated damages and costs including attorney's fees (Compl. ¶ 14). Plaintiffs filed a
13 complaint on January 31, 2012. The executed summons indicates that the complaint was served
14 in person on February 15, 2012, to the executive vice president of Dynamic and Anacon who is
15 authorized to accept service (Dkt. Nos. 6, 7). Default was entered as to Dynamic and Anacon on
16 June 18, 2012 (Dkt. 16). This motion for default judgment was filed and served on defendants
17 by mail on August 30, 2012 (Dkt. No. 34). No response from defendants has been received.

18 ANALYSIS

19 The prior order on default judgment found that plaintiffs' complaint sufficiently states
20 a meritorious claim for violation of ERISA. The order, however, refused to accept as true
21 plaintiffs' allegations for the amount of damages and required plaintiffs to provide a sworn
22 record that justifies its request in greater detail. Plaintiffs have now provided a declaration
23 submitted under penalty of perjury by their actuary. The actuary's declaration provides a
24 detailed justification of the amount of withdrawal liability and a detailed description regarding
25 how the withdrawal liability amount was determined. Furthermore, appended to the actuary's
26 declaration is the report on employer withdrawal liability used in the actuary's calculations and
27 the actuary's letter to plaintiffs regarding Dynamic's liability.

28

1 Plaintiffs seek default judgment against both Anacon and Dynamic for Dynamic's
2 violation of ERISA. 29 U.S.C. 1301(b)(1) provides that trades and businesses operated under
3 common control are considered a single entity and thus are jointly and severally liable for
4 each other's withdrawal liability. *Board of Trustees of Western Conference of Teamsters*
5 *Pension Trust Fund v. Lafrenz*, 837 F.2d 892, 893 (9th Cir. 1988). Trades or businesses under
6 common control include brother-sister groups which are defined as businesses in which the
7 same five or fewer people own a controlling interest in each organization and are in effective
8 control of each organization. 26 I.R.C. 414(c)-2(c)(1). Here, Michelle K. Craig owned 95%
9 of Dynamic and 100% of Anacon (Babu Decl. ¶¶ 5-6). Accordingly, Dynamic and Anacon are
10 members of a brother-sister group and are thus under common control and jointly and severally
11 liable.

12 Plaintiffs seek a judgment against defendants granting the following relief:
13 (1) \$1,094,335 in unpaid contributions; (2) \$218,871 in liquidated damages; (3) \$128,023.14
14 in interest; (4) \$3,539.84 in costs; and (5) \$6,471 in attorney's fees. "In any action under this
15 section to compel an employer to pay withdrawal liability, any failure of the employer to make
16 any withdrawal liability payment within the time prescribed shall be treated in the same manner
17 as a delinquent contribution (within the meaning of section 1145 of this title)." 29 U.S.C.
18 1451(b). An award of the unpaid contributions, interest, liquidated damages, and reasonable
19 attorney's fees and costs is mandatory, pursuant to Section 1132(g)(2) when (1) a judgment has
20 been obtained in favor of the plan, (2) unpaid contributions exist at the time of suit, and (3) the
21 plan provides for such an award. *Nw. Adm'rs., Inc., v. Albertson's Inc.*, 104 F.3d 253, 257-58
22 (9th Cir. 1996); *Teamsters Pension Trust Fund-Board of Trustees of the Western Conference v.*
23 *Allyn Transp. Co.*, 832 F.2d 502, 507 (9th Cir. 1987). Here, all requirements have been satisfied.
24 The plan authorized an award for damages in the event of a withdrawal and withdrawal liability
25 was unpaid at the time this suit was filed, and remains unpaid to date. Below is a determination
26 of relief based on plaintiffs' motion for default judgment.
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28

1 **1. UNPAID CONTRIBUTIONS.**

2 Plaintiffs claim that the principal owed by defendants in withdrawal liability is
3 \$1,094,355. The withdrawal liability assessments were calculated using the presumptive method
4 of allocation as described in ERISA Section 4211(b) (Feldman Decl. ¶ 7). The calculation
5 of withdrawal liability is based on Dynamic's withdrawal during the 2009 plan year. It was
6 calculated using the unfunded vested benefits as of December 31, 2008, and the assumptions
7 specified in the actuary's report on employer withdrawal liability as of December 31, 2008,
8 that was generated on November 16, 2009 (Feldman Decl. ¶ 9). The withdrawal liability was
9 determined based on data provided to the actuary consisting of the contributions Dynamic was
10 obligated to make to the plan from 1998 through 2008 (Feldman Decl. ¶ 10). The actuary's
11 calculations indicate the withdrawal liability payment owed is \$1,094,355. Plaintiffs' motion
12 sufficiently substantiates how this amount was calculated. As such, plaintiffs' request for
13 \$1,094,355 in unpaid contributions is hereby **GRANTED**.

14 **2. LIQUIDATED DAMAGES.**

15 Section 1132(g)(2) provides that liquidated damages are recoverable and may not
16 exceed "20 percent (or such higher percentage as may be permitted under Federal or State law)"
17 of unpaid contributions. In order to award liquidated damages, our court of appeals requires
18 (1) the fiduciary must obtain a judgment in favor of the plan, (2) unpaid contributions must exist
19 at the time of suit, and (3) the plan must provide for liquidated damages. Once the provision
20 applies, liquidated damages are mandatory. *Idaho Plumbers & Pipe Fitters Health and Welfare*
21 *Fund v. United Mech. Contractors, Inc.*, 875 F.2d 212, 215 (9th Cir. 1989).

22 Here, all three requirements for liquidated damages are satisfied. Withdrawal liability
23 was unpaid at the time the suit was filed, and remains unpaid to date. Additionally, the
24 collective bargaining agreement provided for liquidated damages at a rate of 20 percent of the
25 delinquent amount upon commencement of litigation (Trento Decl. ¶¶ 7, 11). The unpaid
26 withdrawal liability at the commencement of this litigation was \$1,094,355; therefore plaintiffs'
27 are entitled to 20 percent of \$1,094,355. Accordingly, plaintiffs' request for liquidated damages
28 in the amount of \$218,871 is **GRANTED**.

1 **3. INTEREST.**

2 Interest on unpaid contributions must be calculated “by using the rate provided under the
3 plan, or, if none, the rate prescribed under Section 6621 of Title 26.” The collective bargaining
4 agreement provided for an interest rate of 10 percent (Trento Decl. ¶ 7). Under 29 U.S.C.
5 1399(c)(3), interest on the accelerated withdrawal liability accrues from the due date of the
6 first delinquent installment payment. Dynamic’s first missed installment payment was due
7 on August 1, 2011, and ten percent interest on the unpaid withdrawal liability has been accruing
8 since that date (Trento Decl. ¶ 12). Accordingly, plaintiffs’ request for \$128,023.14. for interest
9 accrued from August 1, 2011, through October 11, 2012, the date of the hearing on this motion,
10 is **GRANTED**.

11 **4. ATTORNEY’S FEES AND COSTS.**

12 Plaintiffs seek \$6,471.00 in attorney’s fees and \$3,539.84 in costs. Plaintiffs have
13 sufficiently substantiated the amount of attorney’s fees, delivery costs and fees for filing
14 and service of process incurred and why such amounts are reasonable (Babu Decl. ¶¶ 11–16).
15 Plaintiffs, however, have failed to substantiate its costs for investigative services totaling \$2,920.
16 Plaintiffs have not provided any information on what the investigative costs were. Plaintiffs
17 have merely included it on a chart listing fees (Babu Decl. ¶ 17). Therefore, plaintiffs’ request
18 for \$6,471 in attorney’s fees and \$619.84 in costs is hereby **GRANTED**. Plaintiffs’ request for
19 \$2,920 in investigative costs is **DENIED**.

20 **CONCLUSION**

21 For the reasons stated above, plaintiffs’ motion for default judgment as to unpaid
22 contributions, liquidated damages, interest and attorney’s fees and costs in the amount of
23 \$1,448,339.98 is **GRANTED**. Plaintiff’s request for investigative fees is **DENIED**.

24 **IT IS SO ORDERED.**

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26 Dated: October 11, 2012.

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WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE